Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

VERA PARKER-BIGBACK,

*Petitioner,*

v.

ST. LABRE SCHOOL, et al.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether or not a claim for discrimination in employment based on marital status as prohibited by state law and statement in employee manual against a Catholic affiliated school is barred by the free exercise clause of the First Amendment of the United States Constitution and subjects the claim to summary judgment ruling.

## PARTIES

The Petitioner is Vera Parker-Bigback, a Northern Cheyenne person, who was a counselor at the St. Labre School at the time of her discharge. Respondent is St. Labre School, a Catholic affiliated school, situated on the Northern Cheyenne Reservation in Montana.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a writ of certiorari to review the opinion and judgment of the Montana Supreme Court entered on 8 August 2000.

## OPINIONS BELOW

The Montana Supreme Court issued its Opinion on 8 August 2000. (App. 1). The District Court Judge issued his Opinion on 17 September 1998 (App. 20). That decision was appealed to the Montana Supreme Court on 11 November 1998.

## JURISDICTION

Jurisdiction over the Montana Supreme Court exists under 28 U.S.C. § 1257. The Montana Supreme Court, which is the State Court of last resort, decided an important Federal question in a way that conflicts with the United States Constitution. It is an important question of Federal Law and it should be settled by the United States Supreme Court.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

1. The case arose when Petitioner, Vera Parker-Bigback, hereinafter Parker, was terminated from her employment with the Respondent St. Labre School, hereinafter St. Labre, on 29 January 1993. Parker believed she had been discriminated against in her employment and believed she also suffered retaliation for help she had given someone else with respect to a discrimination claim. She filed a claim within appropriate statutory periods for discrimination before the Montana Human Rights Commission. The Human Rights Commission determined that there was probable cause. A right-to-sue letter was issued on 17 February 1995. On 19 April 1995

Parker filed a Complaint For Discrimination In Employment And Retaliation and demanded a jury trial. Discovery was undertaken, depositions were taken and on or about 6 October 1995 St. Labre moved for Summary Judgment. Summary Judgment was briefed and argued and on 17 September 1998 the Court entered its Order Granting St. Labre's Motion for Summary Judgment. (App. 20). On 14 October 1998 Judgment was entered and Notice was given. Notice of Appeal was filed on 13 November 1998. On 8 August 2000 the Montana Supreme Court entered its decision (App. 1). The question as to discrimination in employment and the right of free exercise of religion was first raised in the State District Court and was the sole issue before the Montana Supreme Court.

Parker is a Northern Cheyenne person and was raised on the Northern Cheyenne Indian Reservation. She commenced her employment with St. Labre School during the time of her early schooling. In 1974, when she was seventeen years of age she was employed in the cafeteria. In December 1977 she continued to be employed in the cafeteria at a somewhat higher hourly rate. In 1977 St. Labre became a BIA school. As a BIA school it was funded and essentially operated as a government school. It continued to be operated as a government school until sometime in 1984 when it again became a Roman Catholic School.

In approximately June 1981 Parker received her Bachelor of Science Degree in elementary education from Montana State University Billings. In August 1981 she commenced work for St. Labre as a teacher in elementary education. She continued to teach at St. Labre receiving

increases in pay each year, excellent evaluations and commendations. On 17 April 1986 Parker was given a sabbatical leave for further education until 1987. She agreed to return to St. Labre to teach for three years. Her benefits were continued. If she did not return her benefits would have to be repaid. On 4 June 1987 Parker received her Masters Degree in education. In 1988 Parker received a Certificate for chemical dependency counseling. In March of 1988 Parker entered into an agreement with St. Labre for employment as Employee Assistant and School Counselor. Parker was hired by Father Dennis Druggan as Director of the Employee Assistance and Counseling Program. She wrote the program and she changed positions from teacher to counselor because of the need for an employee assistance program. She continued to work at St. Labre, received excellent evaluations and commendations and pay increases. By January 1991 she had been employed for eleven (11) years at St. Labre. On 10 January 1991 Parker requested assistance for continuing education. In 1992 Father Emmett Hoffman, who was Parker's supervisor, claims to have discussed what he perceived as Parker's lack of professionalism with her in his office. That discussion took place in 1992 before she went to summer school.

In January 1992 Father Emmett agreed that Parker could continue attending school and authorized payment from funds to assist her. On 15 May 1992 Father Emmett Hoffman had a meeting with Parker and he stated that in the meeting he gave notice to Parker of the elimination of her position. He made notes of that meeting and there is nothing in the notes that indicates elimination of her position was even discussed. In fact, the notes seem to

discuss her employment in the context of the next year. On 7 January 1993 Parker was given official notice that her position would not be funded and that a Personnel Department would be established. Parker was never offered the opportunity to apply for the Personnel Director's position although she had more qualifications than the person who was hired. In June 1994 Parker became a Licensed Professional Counselor.

St. Labre is a Montana non-profit corporation for education. The employee manual that was given to Parker provides as follows:

*AFFIRMATIVE ACTION*

> St. Labre complies with Federal and State law regarding discrimination in employment. . . . employees shall hold employment without discrimination because of . . . marital status as required by the Montana Human Rights Act and the Federal law.
>
> Qualified Indian applicants living on or near the Northern Cheyenne or Crow Indian Reservations will be preferred for employment. Preference can and will also be given to those who uphold and witness the teachings of the Roman Catholic Church.

Parker's claim is that she was discriminated against in her employment because of her marital status (she was living with a man who was not her husband) in violation of the Montana anti-discrimination laws and the provisions of the Employee Manual.

## REASONS THE COURT SHOULD GRANT THE PETITION

Parker clearly has a fundamental right to be free from discrimination in her employment. The Roman Catholic Church, in operating a school, hiring teachers and counselors, particularly, in view of its statement on affirmative action, may not fail to comply with the Federal Constitution and laws regarding discrimination in employment. In this case the discrimination neither advances nor inhibits religion and the government is not entangled. It is well established that the state may regulate affairs impacting religious activity when there is an overriding governmental interest in so doing. *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed. 2d 127 (1982), St. Labre in operating a school must comply with all laws that regulate its relationship with its employees.

The State of Montana has enacted statutes which prohibit discrimination in employment. MCA § 49-2-303 provides in relevant part as follows:

> **49-2-303 Discrimination in employment.** (1) It is an unlawful discriminatory practice for:
>
> > (a) an employer to . . . bar a person from employment, or to discriminate against a person in . . . privilege of employment because of . . . marital status . . .

There is nothing in that section of law that excludes educational institutions operated by religious organizations. The State of Montana allows St. Labre to operate its schools and imposes as one of the minimum standards that it not discriminate, including discrimination as to

marital status. St. Labre has also self-imposed that standard:

> *AFFIRMATIVE ACTION*
>
> St. Labre complies with Federal and State law regarding discrimination in employment. . . . employees shall hold employment without discrimination because of . . . marital status as required by the Montana Human Rights Act and the Federal law.
>
> Qualified Indian applicants living on or near the Northern Cheyenne or Crow Indian Reservations will be preferred for employment. Preference can and will also be given to those who uphold and witness the teachings of the Roman Catholic Church.

The United States Supreme Court in the case of *Lemon v. Kurtzman*, 91 S.Ct. 2105, 2111 (1971) stated as follows:

> A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.
>
> * * *
>
> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests [exist]. . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster "an excessive government entanglement with religion."

The Statutes of the State of Montana in this case clearly meet all three of those tests. The Statute has a pure secular purpose, that is that organizations and institutions do not discriminate against their employees. The discrimination neither advances nor inhibits religion and the government is not entangled. To deny Parker's right to pursue her discrimination claim would certainly advance and work to establish the Roman Catholic Religion.

The case of *Intern. Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987) citing the *Lemon* Case, *supra* stated that:

> *Lemon's* 'purpose' requirement aims at preventing [Congress] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

As we pointed out hereinabove, Title VII does have certain exemptions for religious organizations. However, in the case of *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), the Ninth Circuit Court of Appeals held that an employer could not require as a condition of employment that an employee attend a devotional service. In the *Townley Engineering* case p. 621 the Ninth Circuit makes the following statement:

> Nevertheless, it is settled that the right to religious practice (unlike the right to religious belief) may be limited by a statute if "it is essential to accomplish an overriding governmental interest."

An employee to be free from discrimination is an overriding governmental interest.

The Montana Supreme Court rests its decision on *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 728 P.2d 794 (1986). In the case of *Davis v. Church of LDS*, 258 Mont. 286, 299, 300, 852 P.2d 640 (1993), the Montana Supreme Court reviewed the *Miller Case* and the Court concluded that in Montana there is no defense of charitable immunity. However, it appears that in Montana in employment discrimination cases there is charitable immunity for the Roman Catholic Church.

The *Davis* case recognizes that a tort of the highest order may justify interference with free exercise of religion. Even if *Miller* were applicable in this case, the right to be free of discrimination in employment as guaranteed by the Constitution, laws and stated policy is a right of the highest order and should clearly be cognizable in the court against St. Labre.

It is interesting to note that in *Davis v. L.D.S. Church*, 244 Mont. 61, 796 P.2d 181 (1990), Davis was a church seminary teacher suing the church for a tort. Although Parker did not stand in the position of a teacher at that time, but rather a specifically designated counselor, the cases are very similar. The Montana Supreme Court allowed Davis to proceed against the church for her tort claim and to recover a substantial amount of money. The discrimination claim of Parker in this case is a tort of high order and she should be allowed to proceed.

Because St. Labre recognizes that it is bound by the Montana law and has adopted that policy and because the right to be free from discrimination is a high order of right, St. Labre's summary judgment based on freedom of

religion under the United States Constitution is not correct.

Federal courts under certain circumstances, will refrain from inquiry into the employment practices of religious institutions evidencing the required "benevolent neutrality" towards religion that is the promise of the Establishment and Free Exercise Clauses. *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334 (1987), *citing Walz v. Tax Comm'n,* 397 U.S. 664, 673 (1970). Particularly, these courts avoid entanglement in internal church affairs by refusing to hear employment disputes between church leadership and ministerial employees.[1] *Serbian Eastern Diocese v. Milivojevich,* 426 U.S. 696 (1976); *see also* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum. L. Rev. 1373 (1981). Consequently, ministerial employees have no meaningful protection from discrimination by their religious employers. *See Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1167 (4th Cir. 1985), *cert. denied,* 478 U.S. 1020 (1986) (affirming that Title VII does not apply to relationships between ministers and religious organizations – even where gender or race discrimination is alleged.)

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[1] Generally, ministerial employees are those whose job duties include "teaching, spreading the faith, church governance, the supervision of a religious order, or supervision of or participation in religious ritual and worship . . . " Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations,* 79 Colum. L. Rev. 1514 (1979).

By contrast, non-ministerial employees are protected from religious discrimination in employment, *Corporation of the Presiding Bishop, supra,* and they are entitled to full protection. *Rayburn,* 772 F.2d at 1171. The courts have accordingly allowed such employees to present evidence of discrimination on basis of gender; for example, even after a defendant religious institution has asserted a religious reason for the employment dispute. *Boyd v. Harding Academy of Memphis, Inc.,* 88 F.3d 410 (6th Cir. 1996) (terminated pregnant and unmarried teacher at Catholic school allowed to make out claim of gender discrimination as basis of termination); *Dolter v. Wahlert High School,* 483 F.Supp. 266 (N.D. Iowa 1980).

Neither the District Court nor the Supreme Court of the State of Montana made a determination that Parker was a ministerial employee nor did they conduct an inquiry into her marital status prior to granting Defendant St. Labre's Motion for Summary Judgment. The District Court conferred a broad immunity for religious institutions to discriminate against all employees on the basis of religion. That is totally out of harmony with constitutional rights and federal law.

## CONCLUSION

For the foregoing reasons the Court should grant a Writ of Certiorari to the Montana Supreme Court.

Respectfully submitted,

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November 2000

No. 98-731
IN THE SUPREME COURT OF THE
STATE OF MONTANA
2000 MT 210

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VERA PARKER-BIGBACK, (Filed Aug. 8, 2000)

Plaintiff and Appellant,

v.

ST. LABRE SCHOOL,

Defendant and
Respondent.

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APPEAL FROM: District of the Sixteenth Judicial District, In and for the County of Rosebud, The Honorable Joe L. Hegel, Judge presiding.

COUNSEL OF RECORD:

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For Respondent: Renee L. Coppock, Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P., Billings, Montana

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Gregory Hatley and Tiffany B. Lonnevik, David, Hatley, Haffeman & Tighe, P.C., Great Falls, Montana (Diocese of Great Falls-Billings)

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Argued: September 30, 1999
Submitted: October 21, 1999
Decided: August 8, 2000
Filed: /s/ Ed Smith
Clerk

Justice TERRY N. TRIEWEILER delivered the Opinion of the Court.

¶1 Vera Parker-Bigback (Bigback) brought this action in the District Court for the Sixteenth Judicial District in Rosebud County to recover damages from the Defendant, St. Labre School, for discriminatory termination of her employment. The District Court awarded summary judgment to St. Labre School. Bigback appeals the District Court's order awarding summary judgment. We affirm the judgment of the District Court.

¶2 The sole issue on appeal is whether the District Court erred when it awarded summary judgment to St. Labre?

## FACTUAL BACKGROUND

¶3 St. Labre is a school operated by the St. Labre Indian School Educational Association, an institution based on the teachings and beliefs of the Roman Catholic Church. Bigback was employed to teach at St. Labre in August 1981. In 1988, she became St. Labre's employee assistance counselor and continued in that capacity until January 1993, when her employment with St. Labre was terminated. Bigback believes she was terminated because her

supervisor, Father Emmett Hoffman, did not approve of her cohabitation with a man to whom she was not married, contrary to Roman Catholic moral teachings. According to St. Labre, however, Bigback's employee assistance counselor position was discontinued at that time and replaced with a personnel department.

¶4 Bigback filed a complaint with the Montana Human Rights Commission (MHRC) in which she alleged that St. Labre discriminated against her when it terminated her employment. The MHRC subsequently issued Bigback a right-to-sue letter and she filed a complaint in the District Court. Bigback's complaint alleged that St. Labre violated §§ 49-2-303 and -301, MCA, because her termination was based on marital status or sex discrimination and was in retaliation for her testimony given in a friend's discrimination proceeding against St. Labre. St. Labre answered the complaint and the parties conducted discovery. St. Labre subsequently moved for summary judgment and the District Court granted the motion on the basis that Bigback's claim would interfere with the "Free exercise" clause of the First Amendment to the United States Constitution. Bigback now appeals the judgment of the District Court.

## STANDARD OF REVIEW

¶5 Our standard of review on appeal from summary judgment orders is de novo. *See Motarie v. Northern Montana Joint Refuse Disposal Dist.* (1995), 274 Mont. 239, 242, 907 P.2d 154, 156. We review a district court's summary judgment to determine whether it was correctly decided

pursuant to Rule 56, M.R.Civ.P., which provides that summary judgment is only appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See Motarie*, 274 Mont. at 242, 907 P.2d at 156.

## DISCUSSION

¶6 Did the District Court err when it awarded summary judgment to St. Labre?

¶7 Bigback asserts that the District Court erred when it awarded summary judgment to St. Labre School. Bigback contends that she was a member of a protected class and that the decision to eliminate her position was made based upon her marital status. Bigback asserts that St. Labre's statement that her position was eliminated to establish a personnel department is merely "a pretext for terminating her because of her lifestyle." Bigback contends that the real reason for eliminating her position "was that at the time the decision was made she was living with someone who was not her husband."

¶8 In response, St. Labre contends it had the right to terminate Bigback's employment following her admitted failure to conform her conduct to Catholic moral values. St. Labre points out that Bigback agreed in writing to conform her conduct to the church's teachings.

¶9 Section 49-2-303, MCA, provides:

> (1) It is an unlawful discriminatory practice for:
>
> (a) an employer to refuse employment to a person, to bar a person from employment, or to

> discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction. . . .

(Emphasis added.)

¶10 Although Bigback did not allege the factual basis of her claim in her complaint, she did testify by deposition. In her deposition, she stated she was hired at St. Labre School in 1981 as a first grade teacher, but assumed the position of employee assistance program director and school counselor in 1988. She held that position until she was terminated from employment in mid-February 1993.

¶11 Bigback was married from 1974 to 1984 and remarried some time subsequent to her termination from employment. She was married at the time of the deposition on July 17, 1995. Therefore, while employed at St. Labre School there were periods of time when she was married and other times when she was single. She was married when she was hired and single when she was terminated. However, she did not claim to have been terminated because she was single. In fact, she had been single for nine years by the time she was terminated.

¶12 When asked during her deposition if she felt there was any personal reason for the termination of her employment, she stated that she believed it was because of Father Emmett Hoffman's disagreement with her lifestyle – "living with someone – ." As previously noted, when she assumed the position of employee assistant

program director and school counselor, she signed an employment contract in which she agreed:

> 4. To conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the school and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church.

¶13 Reverend Gilbert Hemauer who was the Chief Executive Officer of St. Labre at the time of his deposition on July 17, 1995, and who was a member of the Roman Catholic clergy with a long-term association with St. Labre School, testified that the school is a Catholic Mission administered by the Great Falls-Billings Diocese of the Catholic Church which espouses the teachings and beliefs of the Catholic faith. He also testified that it is important that the school's administrative employees demonstrate a lifestyle which reflects the beliefs of the Roman Catholic Church if they are to serve as role models for the children educated at the school and that it is inconsistent with the church's teachings for a person to cohabit with someone of the opposite sex to whom she is not married.

¶14 Accepting Bigback's claim as true for purposes of the summary judgment motion (even though St. Labre School denies she was terminated because of her cohabitation), we conclude that her termination had nothing to do with her marital status, it was based on her conduct.

¶15 In other words, based on the facts in this case, it would have made no difference whether Bigback was

married or single. If she had cohabited with someone of the opposite sex to whom she was not married, the same result would have occurred. She would have engaged in personal conduct at variance with and contrary to the moral and religious teachings of the Roman Catholic Church.

¶16 No authority has been offered to suggest that either Article II, Section 4 of the Montana Constitution, which prohibits discrimination against people based on various characteristics or beliefs, or § 49-2-303, MCA, prohibit discrimination based on a person's conduct. Nor has any authority been offered to persuade us that Bigback's conduct at issue involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices as guaranteed by the First Amendment to the United States Constitution and our decision in *Miller v. Catholic Diocese of Great Falls, Billings* (1986), 224 Mont. 113, 728 P.2d 794.

¶17 Therefore, based on Bigback's allegations as demonstrated by her deposition testimony, we see no need to balance those religious rights upon which the District Court based its decision against Bigback's right to be free from discrimination based on marital status or her gender. This case is not about marital status or gender. It is about conduct which Bigback agreed to avoid when she signed her employment agreement with St. Labre School. Even if she was terminated for the reason alleged, we conclude that her rights to be free from discrimination were not involved.

¶18 We note that neither is it necessary to address Bigback's alternative claim that she was terminated from

employment in retaliation for assisting a fellow employee with that person's complaint to the Human Rights Commission. Although Bigback did allege in her complaint that she was alternatively terminated in violation of § 49-2-301, MCA, for assisting Jeanie Hanic with her complaint, that claim has been abandoned by Bigback on appeal and has neither been briefed nor argued.

¶19 For these reasons, we affirm the judgment of the District Court.

/s/ Terry Trieweiler
Justice

We Concur:

/s/ J. A. Turnage
Chief Justice

/s/ William E. Hunt

/s/ Jim Regnier

/s/ _____

/s/ _____

/s/ _____
Justices

---

Justice KARLA M. GRAY, specially concurring.

¶20 I concur in the Court's overall result on both Bigback's discrimination claim and her retaliation claim. However, I would reach both results under different analyses than those used by the Court.

¶21 In moving for summary judgment, St. Labre asserted that the District Court's exercise of jurisdiction over the case would violate its right to free exercise of religion under the United States and Montana Constitutions and, alternatively, that Bigback could not establish a *prima facie* case of discrimination under §§ 49-2-303 and 49-2-301, MCA. The District Court concluded it could not hear the case without interfering with St. Labre's legitimate claim to free exercise of religion and granted St. Labre summary judgment on that basis. As a result of its conclusion on the threshold constitutional freedom of religion issue, the court did not address St. Labre's alternative argument. Bigback contends the District Court erred in granting summary judgment to St. Labre. St. Labre argues, on the other hand, that the District Court correctly granted summary judgment based on its constitutional right to free exercise of religion and also reiterates its alternative argument that Bigback cannot establish a *prima facie* case of discrimination.

¶22 We previously have set forth two tests under which summary judgment motions in discrimination cases are to be analyzed. One test, developed in *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787, is applied in cases where the employer's alleged discriminatory intent can be established only through circumstantial evidence. *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶15, 287 Mont. 196, ¶15, 953 P.2d 703, ¶15. The other test is applied in what are termed "direct evidence" cases, where the reason for the employer's action is not disputed, but the parties dispute whether the action constitutes illegal discrimination. *Reeves*, ¶¶ 16-18. Here, the parties dispute the reason for Bigback's termination and,

consequently, this is a circumstantial evidence case which must be analyzed under the *Heiat* summary judgment test.

¶23 Under the *Heiat* test applicable to an employer's summary judgment motion in a circumstantial evidence discrimination case, the plaintiff's complaint first must allege a *prima facie* case of discrimination. *Heiat*, 275 Mont. at 331, 912 P.2d at 793. A *prima facie* case of discrimination is sufficiently stated via allegations that the plaintiff is a member of a protected class, the plaintiff was performing her job satisfactorily and the employer engaged in specified conduct which constituted discrimination against plaintiff as part of the protected class. *See Heiat*, 275 Mont. at 331, 912 P.2d at 793; *Reeves*, ¶21; *Clark v. Eagle Systems, Inc.* (1996), 279 Mont. 279, 286, 927 P.2d 995, 999. If a *prima facie* case is alleged, the employer must come forward with a legitimate nondiscriminatory reason for the action at issue. *Heiat*, 275 Mont. at 331, 912 P.2d at 793. If the employer establishes a nondiscriminatory reason, the plaintiff then must produce evidence that establishes her *prima facie* case, as well as evidence which raises an inference that the employer's asserted nondiscriminatory reason is pretextual. *Heiat*, 275 Mont. at 331-32, 912 P.2d at 793.

¶24 Against this backdrop, it is my view that the proper approach in this case is to review Bigback's four-paragraph complaint in the District Court to determine whether it alleges a *prima facie* case of marital status or sex discrimination or retaliation. The first paragraph of Bigback's complaint alleges the beginning and ending dates of her employment with St. Labre, that the MHRC issued her a right-to-sue letter and that the complaint is

filed pursuant to § 49-2-509, MCA. The right-to-sue letter was attached and incorporated into the complaint; it contained no factual allegations. The second paragraph of Bigback's complaint states – correctly – that § 49-2-303, MCA, prohibits discrimination in employment on the basis of marital status and sex and § 49-2-301, MCA, prohibits retaliation against an employee for being a witness or opposing any practices prohibited by the statutes regarding discriminatory practices. The paragraph then alleges Bigback assisted Jeanne Hanic in filing a complaint against St. Labre with the MHRC and was a witness on Hanic's behalf in that proceeding. Finally, the paragraph alleges in one sentence that Bigback "was terminated because of her marital status, sex or retaliation or all three." The third paragraph of Bigback's complaint sets forth the relief sought in the form of injunctive relief and monetary damages, and the fourth paragraph requests attorney fees and costs.

¶25 With regard to the allegation of marital status and sex discrimination, Bigback's complaint does not allege any conduct on the part of St. Labre which would constitute such discrimination. As stated above, to allege a *prima facie* case of discrimination, the complaint must allege specified conduct which forms the basis for the alleged discrimination. *See Heiat*, 275 Mont. at 331, 912 P.2d at 793; *Reeves*, ¶21; *Clark*, 279 Mont. at 286, 927 P.2d at 999. Absent any factual allegations regarding conduct by St. Labre which constituted marital status or sex discrimination, Bigback's complaint fails to allege a *prima facie* case of marital status or sex discrimination under § 49-2-303(1)(a), MCA, as required by the first prong of the *Heiat* test and I would resolve her discrimination

claim on that basis, rather than proceeding to the merits as the Court does in reliance on her deposition testimony.

¶26 With regard to Bigback's retaliation claim, I disagree that she abandoned it on appeal. While the retaliation claim is certainly not the focal point of Bigback's brief, she does quote the retaliation statute and asserts she was retaliated against. St. Labre responds that the record contains no evidence supporting the retaliation claim. Therefore, it is my view that this claim should be addressed and resolved under the *Heiat* test.

¶27 Bigback's complaint alleges that she was terminated in retaliation for assisting with, and being a witness in, Hanic's human rights complaint against St. Labre. I conclude that this sufficiently alleges a *prima facie* case of retaliatory termination under § 49-2-301, MCA, to satisfy the first prong of the *Heiat* test. As a result, St. Labre is required to come forward with evidence establishing a legitimate nondiscriminatory – or nonretaliatory – reason for Bigback's termination. *See Heiat*, 275 Mont. at 331, 912 P.2d at 793. In support of its summary judgment motion, St. Labre submitted the deposition of Fr. Hoffman, Bigback's supervisor at St. Labre. Fr. Hoffman testified that Bigback was not actually terminated but, because Fr. Hoffman believed that Bigback's employee assistance counselor position was no longer effective, her position was eliminated in favor of establishing a more formal personnel department. Fr. Hoffman further testified that, at the time Bigback's employment with St. Labre ended, he was not aware that she had been involved with – or a witness in – Hanic's human rights complaint and, accordingly, that was not the reason her position was eliminated. I conclude Fr. Hoffman's testimony establishes a

legitimate nondiscriminatory reason for Bigback's termination and satisfies the second prong of the *Heiat* test. The burden then shifts back to Bigback to produce evidence establishing a *prima facie* case of retaliation and raising an inference that St. Labre's stated reason for her termination is pretextual. *Heiat*, 275 Mont. at 331-32, 912 P.2d at 793. On this record, Bigback did not meet her burden.

¶28 Susan Schipman, Fr. Hoffman's executive secretary, testified via her deposition that she knew Bigback had assisted with and testified in Hanic's discrimination complaint and may have discussed other aspects of those complaint proceedings with Fr. Hoffman. She did not know, however, whether Fr. Hoffman was aware of Bigback's involvement in the proceedings. Bigback's deposition testimony stated she had never been told her position was eliminated as a result of her involvement in Hanic's discrimination complaint; nor could she state a reason why she believed she was terminated for that involvement. Finally, when asked whether anyone at St. Labre knew of her involvement in Hanic's complaint, she stated that Schipman "probably" knew, but she did not testify that Fr. Hoffman knew or even "probably" knew.

¶29 The third prong of the *Heiat* test, requiring the plaintiff to produce evidence establishing a *prima facie* case of discrimination, as well as evidence raising an inference of pretext, corresponds to the general Rule 56, M.R.Civ.P., burden on the nonmoving party to come forth with evidence raising a genuine issue of material fact to survive a motion for summary judgment. *Heiat*, 275 Mont. at 333, 912 P.2d at 794. In that regard, the evidence required to meet this burden and preclude summary

judgment must be of a substantial nature; mere denial, speculation or conclusory statements are insufficient. *McGinnis v. Hand*, 1999 MT 9, ¶18, 293 Mont. 72, ¶18, 972 P.2d 1126, ¶18. Bigback presented no substantial evidence that Fr. Hoffman was aware she assisted with, and was a witness in, Hanic's discrimination complaint, let alone that her involvement was the basis for her termination from St. Labre. At most, her evidence in this regard was mere speculation and insufficient to meet her burden of presenting evidence establishing a *prima facie* case of retaliation and raising an inference of pretext as required under the third prong of the *Heiat* test.

¶30 On these bases, I join the Court in concluding that the District Court did not err in granting summary judgment to St. Labre on Bigback's claims.

/s/ Karla M. Gray
Justice

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Justice W. WILLIAM LEAPHART, dissenting.

¶31 I dissent.

¶32 Vera Parker-Bigback (Bigback) started working at St. Labre as a teacher in 1981. She moved up to St. Labre's employee assistance counselor in January 1988, and remained in that position until January 1993 when she was terminated. Relying in part on the fact, established through deposition, that her supervisor, Father Emmett Hoffman, had, in 1992, expressed to Bigback his concern that her lifestyle (living with a man not her husband) did

not reflect nor conform to Roman Catholic values and principles, Bigback filed suit for discrimination under § 49-2-303(1)(a), MCA, which makes it illegal to terminate an employee on the basis of marital status.

¶33 Bigback was employed by St. Labre pursuant to a written contract by which she agreed to

> conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church.

¶34 Among other matters, the St. Labre Indian School Educational Employee Manual contains the following statement of policy:

> AFFIRMATIVE ACTION
>
> St. Labre complies with Federal and State law regarding discrimination in employment. Applicants for employment shall be considered for employment, and employees shall hold employment, without discrimination because of age, sex, physical or mental handicap or marital status as required by the Montana Human Rights Act and the Federal Law.

¶35 Bigback argued to the District Court that St. Labre, through the statement of nondiscrimination in its Employee Manual, put aside its constitutional shield to the free exercise of religion and consented to be governed by the secular rules regarding discrimination.

¶36 In reviewing St. Labre's motion for summary judgment, the District Court reviewed St. Labre's employee manual and the employment contract and noted the express language in the contract requiring Bigback "[t]o conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church." In light of this language, the court held that there is no question but that St. Labre reserved the right to require that Bigback's personal life conform with Catholic moral and religious teachings. Finally, the court concluded that, even if there were merit to Bigback's claim of discrimination, the constitutional guarantee of free exercise of religion overrides Bigback's right to be free from discrimination.

¶37 The District Court erred in interpreting the employment contract as reserving unto St. Labre the right to require that Bigback not cohabit with a man not her spouse. The court's conclusion is based upon the general contract provision requiring adherence to the moral and religious teachings of the Roman Catholic Church. In its rush to honor the constitutional right to free exercise of religion, however, the court overlooked the more specific provision of the contract that prohibits Bigback from engaging in any conduct or lifestyle which would be at variance with or contrary to the policies of the school. One of the stated policies of the school was that: "Applicants for employment shall be considered for employment, and employees shall hold employment, without

discrimination *because of . . . marital status* as required by the Montana Human Rights Act and the Federal law." The contract does not purport to set forth or summarize what is encompassed within the "moral and religious teachings and beliefs" of the Roman Catholic Church. To the extent that the contract's generally stated moral imperative proscribes cohabitation with a non-spouse, it, at best, results in an ambiguity when read in context of the contract provision incorporating St. Labre's explicit policy of nondiscrimination on the basis of marital status. Uncertain terms in a contract are to be construed against the party causing the uncertainty. *Mueske v. Piper, Jaffray & Hopwood, Inc.* (1993), 260 Mont. 207, 216, 859 P.2d 444, 449-50. In this case, that party is St. Labre.

¶38 Thus, although the moral teachings of the Church may disapprove of a single person cohabiting with someone of the opposite sex, the Church waived that objection when it drafted a contract allowing Bigback to engage in a lifestyle so long as it was not at variance with the policies of the school. The fact that Bigback, a single woman, was living with a man is not at variance with school policy. Rather, it is entirely consistent with the school's policy of not discriminating on the basis of marital status.

¶39 The Court's opinion concludes that Bigback's termination had nothing to do with her marital status, rather it was based upon her conduct. I disagree. Her conduct was living with someone of the opposite sex. In order to determine whether that conduct offends the teachings of the Catholic Church, one must look to her marital status. If, as here, her marital status is single, then the conduct is offensive to the Church. If she is married, it depends

upon to whom she is married. If she is married to the person with whom she cohabits, then the conduct comports with Church teachings. If she is married to someone other than the person with whom she cohabits, then the relationship is adulterous and offends another teaching of the Church. In my view, given Father Hoffman's expressed disapproval of Bigback living with a man without the benefit of marriage, her termination was about marital status.

¶40 The District Court invoked *Miller v. Catholic Diocese of Great Falls* (1986), 224 Mont. 113, 728 P.2d 794, for the proposition that the constitutional guarantee of free exercise of religion "shield from court review the conduct of religious entities to the extent such conduct is inextricably intertwined with the mission and teachings of the particular church." In *Miller*, this Court determined that it could not resolve the issue of good faith without examining the school's discipline policy as applied to classroom instruction and that "[s]uch an examination of necessity would impinge upon elements of the teaching of religion, or the free exercise of religion." *Miller*, 224 Mont. at 118, 728 P.2d at 797.

¶41 In contrast to *Miller*, the issue presented by Bigback can be resolved without examining or impinging upon the religious policies of the Church. The question is purely one of contract. The District Court should have denied the motion for summary judgment on the basis of contract law and should not have reached the constitutional issue of free exercise of religion. Had the District Court denied summary judgment and allowed Bigback to proceed with her discrimination claim, the court would not have interfered with the free exercise of religion.

Rather it would have permitted resolution of an issue as to whether the Church was bound to honor the express terms of its own contract and employment policy.

¶42 I would hold that the District Court erred in granting summary judgment to St. Labre. I would reverse the summary judgment, remand and allow Bigback to proceed with her discrimination claim. As to the retaliation claim, I concur with the Court's resolution of that issue.

/s/ W. William Leaphart
Justice

Justice JAMES C. NELSON joins in the foregoing dissent of Justice W. WILLIAM LEAPHART.

/s/ James C. Nelson
Justice

**MONTANA SIXTEENTH JUDICIAL DISTRICT COURT**
**ROSEBUD COUNTY**

| | |
|---|---|
| **VERA PARKER-BIGBACK,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**ST. LABRE SCHOOL, and Defendants A through C,**<br><br>**Defendants.** | **DV 95-52**<br>**Judge Joe L. Hegel**<br><br>**MEMORANDUM AND ORDER** |

Before the Court is Defendants' Motion for Summary Judgment. This matter was fully briefed and was stipulated to be deemed submitted upon the filing of depositions on January 30, 1996. From the evidence and the record, the Court issues the following Memorandum and Order:

## Memorandum

**Facts.**

The facts of this case are relatively undisputed. The Defendant St. Labre School ("St. Labre") is a non-profit Catholic institution which serves the Crow and Northern Cheyenne communities and espouses the teachings and beliefs of the Roman Catholic faith. Except for a period from 1977 to 1984, when the school operated as a BIA funded school, St. Labre has operated a school which reflects Christian, Roman Catholic values and principles. St. Labre has been mainly staffed by Roman Catholic

priests and sisters. As a Roman Catholic organization, St. Labre expects its teachers, supervisors and counselors to be aware of and abide by Roman Catholic teachings in order to further the mission of the Roman Catholic Church.

The Plaintiff, Vera Parker-Bigback (Ms. Parker-Bigback), graduated from high school at St. Labre and St. Labre hired her as a teacher in 1981. In 1988, Ms. Parker-Bigback's job description changed to "Employee Assistance Counselor." She signed an employment contract whereby, among other things, she agreed.

> "To conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church."

Among other things, the St. Labre Indian School Educational Employee Manual provides:

> "NO STATEMENT, INFORMATION OR POLICIES SET FORTH IN THIS MANUAL IS INTENDED TO BE, NOR DOES IT, CONSTITUTE A CONTRACT BETWEEN ST. LABRE AND ANY INDIVIDUAL.
>
> * * *
>
> "St. Labre administers the work of Catholic education and social services at St. Labre at Ashland as well as at other sites on the Northern Cheyenne and Crow Indian Reservations.

"For more than 100 years, the goal of St. Labre has been to do the work of Christ, St. Labre does this especially through education.

"AFFIRMATIVE ACTION

"St. Labre complies with Federal and State law regarding discrimination in employment. Applicants for employment shall be considered for employment, and employees shall hold employment, without discrimination because of age, sex, physical or mental handicap or marital status as required by the Montana Human Rights Act and the Federal law.

"Qualified Indian applicants living on or near the Northern Cheyenne or Crow Indian Reservations will be preferred for employment. Preference can and will also be given to those who uphold and witness the teachings of the Roman Catholic Church."

On May 15, 1992, Fr. Emmett Hoffman (then Ms. Parker-Bigback's supervisor) met with Mr. Parker-Bigback and explained to her that he did not think she conducted herself in a professional manner and that he did not approve of her then current life style – she was living with a man without the benefit of being married to him, which is contrary to the teachings of the Roman Catholic Church. On September 15, 1992, Fr. Emmett Hoffman wrote Ms. Parker-Bigback a letter which, among other things, summarized the May 15th meeting alleging an agreement whereby St. Labre would pay for Ms. Parker-Bigback's training to become a certified counselor so she could "pursue a private career" as a counselor. Ms. Parker-Bigback does not necessarily agree there was such an agreement.

In February of 1993, St. Labre eliminated Ms. Parker-Bigback's position as "Employee Assistance Counselor" and replaced it with a personnel department.

**Discussion.**

After filing the required proceeding before the Montana Human Rights Commission, Ms. Parker-Bigback filed a complaint with this Court alleging St. Labre had discriminated against her with respect to her sex, marital status and had illegally retaliated against her for asserting her civil rights.

St. Labre claims this Court is without jurisdiction to consider Ms. Parker-Bigback's claims because it necessarily involves church doctrine, faith, policy, practice and administration, and, as such, is declared off-limits by the free exercise of religion clauses of the United States Constitution and the Montana Constitution. U.S. Constitution, First Amendment; Montana Constitution, Article II, Section 5. St. Labre also claims it did not discriminate against Ms. Bigback-Parker [sic], but acted with a legitimate business reason.

Ms. Parker-Bigback replies St. Labre has subjected itself to the Montana anti-discrimination laws by the recital in the Employee Manual and that the claimed legitimate business reason is merely a pretext.

It is clear that the free exercise of religion clauses of the United States and Montana Constitutions shield from court review the conduct of religious entities to the extent such conduct is inextricably intertwined with the mission and teachings of the particular church. *Miller v. Catholic*

*Dicese of Great Falls*, 224 Mont. 113, 728 P.2d 794 (1986). The facts in this case also make it clear that St. Labre is a religious institution on a religious mission. The initial question is whether St. Labre, through its employee manual, has put aside this shield and consented to be governed by the secular rules regarding discrimination. After reviewing the totality of the statements in the employee manual and in the employment contract, the Court concludes that St. Labre did not waive its free exercise of religion with respect to the ability to require its emloyees to lead exemplary personal lives. The employee manual affirmatively states preference shall be given to those "who uphold and witness the teachings of the Roman Catholic Church" and Ms. Parker-Bigback signed a contract which expressly required her

> "To conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church."

Given this express language, there is no question but that St. Labre had reserved the right to require conformity with Catholic moral and religious teachings in Ms. Parker-Bigback's professional and personal life in order to promote its religious mission. *Miller* is directly on point.

This Court also finds that it cannot make the requested determinations without interfering with a legitimate claim to the free exercise of religion. Even assuming St. Labre terminated Ms. Parker-Bigback is correct in

her assertion that St. Labre terminated her employment because she had been living with a man without the benefit of marriage, this constitutional protection overrides any claimed violation of Ms. Parker-Bigback's right to be free from such discrimination. In other words, religious freedom allows churches to make decisions (discriminate) based on what would otherwise be a matter of personal morality.

The issue of free exercise of religion being controlling the Court does not need to reach the other issues regarding the discrimination claim.

**Order**

**THEREFORE, IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment is granted and Plaintiff's complaint is dismissed.

2. Defendants are entitled to their costs.

3. Defense counsel shall prepare a written judgment in accordance with this Memorandum and Order.

4. The Clerk of Court shall mail or deliver a copy of this document to counsel of record and any parties not represented by counsel at their last known addresses.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: September 17, 1998.

[SEAL]

/s/ Joe L. Hegel
JOE L. HEGEL, District Judge

cc: K.D. Peterson
Reneé L. Coppock
9-21-98 sb